SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

CIVIL DIVISION

JIM GRAHAM	)
v.	)
DISTRICT OF COLUMBIA BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY	)

PETITION FOR REVIEW OF ACTION OF THE BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

This matter arises from a February 7, 2013 Memorandum Opinion of the District of Columbia Board of Ethics and Government Accountability ("BEGA") in which the newly-created BEGA dismissed its preliminary investigation into certain conduct of District of Columbia Councilmember Jim Graham, but – contrary to law and to its own rules - made "factual findings" and legal conclusions that Mr. Graham had violated three provisions of the DC Code of Conduct. BEGA's findings and conclusions violated the statute which conveys BEGA its authority, as well as its own rules, and denied Mr. Graham the due process to which he was entitled under both the Ethics Act and the United States Constitution.

Mr. Graham has suffered severe reputational harm as a result, including impending irreparable harm to his fifteen-year career as a sitting member of the D.C. Council. On February 8, 2013, Tommy Wells, a Councilmember from Ward 6, wrote to D.C. Council Chairman Phil Mendelson citing BEGA's Memorandum Opinion and requesting that on the basis of it Mr. Mendelson establish an ad hoc committee to consider "evidence of a violation of the Code of Conduct and make recommendations for further action." *See* Exh. 1. This week, there will be

resolutions introduced by D.C. Council Chairman Philip Mendelson that would propose, *inter alia*, sanctions against Mr. Graham including an official reprimand and the potential loss of his committee assignments on the Council. The predicate on which the Council would take this action is the unlawful decision issued by BEGA. *See* Graham Affidavit, Exh. 2. In a separate motion filed herewith, Mr. Graham seeks immediate injunctive relief from BEGA's Memorandum Opinion in his Motion for a Temporary Restraining Order and Preliminary Injunction. In this petition for review from the Board's actions, Mr. Graham asks that this Court enter an Order finding that BEGA's Memorandum Opinion was contrary to law and that its so-called "factual findings" and conclusions that Mr. Graham acted contrary to the DC Code of Conduct laws must be stricken. BEGA's separate February 7, 2013 Order of Dismissal of the preliminary investigation, on the ground that it has no power to sanction Mr. Graham based on the *ex poste facto* clause of the United States Constitution, is correct and should stand.

JURISDICTION

This Court has jurisdiction over direct appeals of any "order or fine made by the [BEGA]." D.C. Code § 1-1162.17. BEGA's rules provide that appeals shall be made "to the Superior Court of the District of Columbia within twenty (20) days of the date the Board or Director's final order or fine is served upon a person subject to the final order or fine." D.C. Mun. Regs. tit. 3, § 5404.1. The Board issued its Memorandum Opinion in the Jim Graham matter on February 7, 2013. *See* Exh. 3. This Court may also review agency orders pursuant to its authority in D.C. Code 1981, Title I, Chapter 6.

FACTUAL BACKGROUND

1. Basis of BEGA's Preliminary Investigation.

In October 2012, the newly-created BEGA announced that it had opened a preliminary investigation into Councilmember Graham's conduct on the basis of information acquired from a report prepared by Cadwalader, Wickersham & Taft LLP (the "Cadwalader Report") on behalf of the Washington Metro Area Transit Authority ("WMATA" or "Metro"). The Cadwalader Report, Exh. 4, examined Councilmember Graham's conduct with regard to negotiation of a joint development project of WMATA property on Florida Avenue, NW (the "Florida Avenue Project"). Councilmember Graham served as a member of the WMATA Board during the negotiation of the Florida Avenue Project; he also was a sitting councilmember.

At the center of the inquiry was Mr. Graham's interaction with an individual named Warren Williams, Jr., who was a principal in Banneker Ventures, one of the bidders for the Florida Avenue Project. Mr. Williams also was a partner in a firm bidding for the District of Columbia lottery contract, which was under consideration by the D.C. Council around the same time. According to the Cadwalader Report, Mr. Graham told Mr. Williams in a May 2008 meeting that Mr. Graham would consider supporting Mr. Williams' company for the lottery contract if Mr. Williams withdrew from his company's participation in the bid for the WMATA Florida Avenue Project. Exh. 4 at 40. In his written submission, Mr. Graham vigorously refuted Mr. Williams' account of the meeting, which was supported by less than half of the participants at that meeting. Exh. 5 at 4-5. He also rejected any notion that he improperly favored a separate firm, LaKritz Adler, which was bidding for the Florida Avenue Project. *Id.* at 6-7. In the end, Mr. Graham cast his vote to support Mr. Williams' firm, Banneker Ventures, which entered the highest bid for the Florida Avenue Project. Exh. 4 at 21. The Cadwalader Report concluded that Mr. Graham's comment to Mr. Williams created a "conflict of interest," or at least the appearance of such a conflict, between his role as a Councilmember and his role on the WMATA

Board. *Id.* at 5. The Cadwalader Report explicitly stated that it found "no evidence" that any WMATA Board member, including Mr. Graham, took actions that were motivated by furthering their own financial interests. *Id.* at 43.

On November 14, 2012, BEGA sent Mr. Graham a letter asking him to respond to the factual findings contained in the Cadwalader Report and for Mr. Graham's response regarding whether his conduct discussed in the report violated certain provisions of the District of Columbia Code of Conduct. *See* Exh. 6. The letter stated that BEGA had opened a preliminary investigation into the matter. *See id.* ("[T]his inquiry is routine under the Ethics Act which requires a preliminary investigation to be conducted in certain instances.")

2. BEGA's Governing Statute and Rules.

Throughout this matter, BEGA acted in violation of the statutory authority granted it under the Government Ethics Act of 2011 (the "Act"), Title II of the Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01 *et seq.*). A brief overview of the relevant provisions of the Act, most of which are also embodied in BEGA's rules, is important.

At all times relevant to this matter, BEGA purported to act under its statutory authority to conduct "preliminary investigations," as authorized by D.C. Code § 1-1162.12. The Act provides that the Director of BEGA "shall conduct a preliminary investigation of a possible violation of the Code of Conduct or of the Act brought to the attention of the Director by any source including but not limited to: (a) the media; (b) a tip received through the hotline; or (c)

documents filed with the ethics board."[1] *Id.* § 1-1162.12(a). The statute further states as to preliminary investigations: "The identity of an individual who is the subject of the preliminary investigation shall not be disclosed without the individual's consent unless or until the Board finds reason to believe that the individual has committed a violation and that disclosure would not harm the investigation." *Id.* § 1-1162.12 (d). [2]

The purpose of the preliminary investigation is to determine whether the evidence merits proceeding to a formal investigation. The Director of Government Ethics conducts a preliminary investigation into possible violations: "If during or after the preliminary investigation, the Director of Government Ethics has reason to believe that a violation of the Code of Conduct or of the Act may have occurred, the Director shall present evidence of the violation to the Board." D.C. Code § 1-1162.12(b). The Board then decides whether to authorize a formal investigation. The standard for proceeding to the formal investigation stage is whether the Board finds that there is "*reason to believe that a violation has occurred.*" *Id.* (emphasis added).

If the Board proceeds to the formal investigation, the Board *must* "conduct an open and adversarial hearing at which the Director of Government Ethics shall present evidence of the violation." *Id.* § 1-1162.14(a). By statutory command, BEGA's hearings must be held in accordance with the same process afforded in other contested cases before administrative

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[1] The preliminary investigation in this case was initiated prior to the BEGA Director assuming his role; upon information and belief, the BEGA Chair initiated the preliminary investigation, sua sponte, upon reviewing the Cadwalader Report.

[2]On October 17, 2012, the Washington Post reported the existence of the preliminary investigation against Mr. Graham. Despite Mr. Graham's name being leaked before he was contacted by BEGA or asked to respond to the findings in the Cadwalader Report, BEGA's Chair defended his decision to release Mr. Graham's identity to the press on the ground that BEGA "unanimously agreed that it had a basis to open a preliminary investigation and that disclosure its existence would not harm the investigation." *See* October 17, 2012 emails between Jim Graham and Robert Spagnoletti, *Exh.* 8.

agencies in the District. *Id.* ("Any hearing under this section shall be of record and shall be held in accordance with Chapter 5 of Title 2"), *see* D.C. Code § 2-509. BEGA's rules thus provide elaborate detail regarding the process for conducting an adversarial hearing. *See generally*, D.C. Mun. Regs. tit. 3, §§ 5500 *et seq.* (attached as Exhibit 7). The respondent is entitled to discovery in advance of the adversarial hearing. BEGA's Rules provide that, prior to the hearing, "the Director must disclose to the respondent and make available for inspection, copying, or photographing any relevant written or recorded statements made by the respondent and any . . . evidence which is in the possession of the Director and which . . . the Director intends to introduce at the hearing; or . . . [a]re material to the preparation of the respondent's defense." *Id.* § 5511.3. Further, at the adversarial hearing, "[a]ll parties . . . have the right to produce evidence and witnesses on their behalf and to rebut or explain testimony or other evidence against them." *Id.* § 5517.1. Additionally, "[a]ll parties have the right to cross-examine other parties and witnesses and to offer argument or explanation in support of their positions or contentions." *Id.* § 5517.2. "In all cases involving a notice of violation, the Director has the burden of persuading the Board that a violation has occurred by substantial evidence." *Id.* § 5518.1. At the close of the adversarial hearing, "[t]he Board may request parties to submit proposed findings of fact and conclusions of law for the consideration of the Board." *Id.* § 5520.1. "Within a reasonable time after the conclusion of the hearing, the Board shall render its decision setting forth findings of fact and conclusions of law and giving the reasons for the decision." *Id.* § 5521.1. *"The conclusions or opinion in the decision shall be governed and based upon all the evidence adduced at the hearing."* *Id.* § 5521.3 (emphasis added). The decision "shall be supported by substantial evidence on the record." *Id.* § 5521.4.

3. Councilmember Graham's Response and Denial of Requests for Discovery.

BEGA's November 14, 2012 inquiry letter contained only a copy of the Cadwalader Report. *See* Exh. 6. It noted that the Cadwalader Report made findings and conclusions that Mr. Graham violated WMATA's standards of conduct. It then asked Mr. Graham to provide an explanation regarding (1) whether he disputed any of the factual findings in the Cadwalader Report; and (2) whether he believed his conduct violated certain provisions of the DC Code of Conduct. *Id.* Through counsel, Mr. Graham requested that BEGA provide him with the entire record underlying the Cadwalader Report in order for him to prepare his response. *See* Exh. 9. Those requests were denied on the ground that BEGA need only provide discovery to a respondent at the formal investigation stage, as opposed to a preliminary investigation. *Id.* On the same basis, BEGA declined to provide Mr. Graham's counsel with Mr. Graham's own sworn statement made when he cooperated with the Cadwalader investigation. Mr. Graham thus prepared his response to BEGA's November 14 inquiry letter based entirely on the contents of the Cadwalader Report, limited of course by which excerpts of its own record Cadwalader chose to include, and which was prepared internally for WMATA, not for the purpose of addressing potential violations of the DC Code of Conduct.

On December 11, 2012, Mr. Graham, through counsel, submitted his response to BEGA's inquiry letter. *See* Exh 5. In that response, Mr. Graham disputed several facts contained in the Cadwalader Report. The response also argued that, even accepting the facts as Cadwalader presented them, Mr. Graham's conduct did not constitute a violation of the DC Code of Conduct. Finally, the response made several procedural arguments urging that BEGA dismiss the preliminary investigation, including, *inter alia*: (1) that certain of the Code of Conduct provisions were so vague as to violate due process; (2) that the statute of limitations had run on

the purportedly problematic behavior, which occurred in 2008; (3) that BEGA could not sanction Mr. Graham for conduct that had occurred in 2008 without violating the *Ex Post Facto* Clause.

Mr. Graham's counsel also asked to present oral argument before the Board. While noting that its rules did not provide for any such opportunity at the Preliminary Investigation stage, the Director notified Mr. Graham's counsel that it would be permitted to appear at the January 18, 2013 meeting of the Board and make a presentation. *See* Mehta Aff. ¶¶ 7, 8, Exh. 10. Mr. Graham's counsel did so, giving a roughly ten minute presentation of the arguments contained in Mr. Graham's response and then answering BEGA members' questions regarding Mr. Graham's arguments. *Id.* ¶ 9. At no time during that meeting, or ever, did BEGA suggest that it was considering making factual and legal findings in the Graham matter without providing any discovery to Mr. Graham or otherwise adhering to the process required by statute and its own rules. *Id.* ¶¶ 10, 11.

4. BEGA Dismisses the Preliminary Investigation and Issues a 27 Page Set of "Factual Findings" and Legal Conclusions.

On February 7, 2013, at its regular meeting, BEGA announced its decision in the Graham preliminary investigation. BEGA concluded that *Ex Post Facto* principles precluded it from imposing any sanctions against Mr. Graham, and that accordingly it would dismiss the preliminary investigation. *See* Exh. 3. However, in a 27-page Memorandum Opinion, BEGA made several factual findings against Mr. Graham and concluded that Mr. Graham violated three provisions of the District's Code of Conduct. *See id.*

Citing to the record "evidence" to which Mr. Graham and his counsel were denied access, much less any opportunity to confront, BEGA made myriad "factual findings" by "substantial evidence" regarding issues raised by the Cadwalader Report, as well as issues found nowhere in the Cadwalader Report. On the seminal factual dispute in the underlying matter, BEGA wrote

that: "the weight of the evidence supports a finding by substantial evidence that Councilmember Graham did, in fact, offer to support Mr. Williams and W2I if he and Banneker Ventures withdrew from the WMATA development project." Exh. 3 at 13.[3]

BEGA also made findings regarding Councilmember Graham's motives for allegedly preferring LaKritz Adler to Banneker Ventures. BEGA "conclude[d], based on the evidence before us, that Councilmember Graham demonstrated a strong preference that LaKritz Adler be awarded the WMATA development project notwithstanding the recommendation of the WMATA joint development committee that its bid would not provide the best return for WMATA." *Id.* at 16. The Board went on to find that the "evidence strongly suggests that Councilmember Graham was motivated, at least in part, by the fact that LaKritz Adler contributed to his campaign and that Banneker and Mr. Williams contributed to his opponent." *Id.* This "finding" would have been easily refuted if Mr. Graham been given an opportunity; indeed, the Cadwalader Report found *no* evidence that Mr. Graham's actions were motivated by any such interest.[4] The harm caused by this false "finding" cannot be overstated.

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[3] The Board stated that this factual finding was necessitated by the contents of Councilmember Graham's deposition. Exh. 3 at 13 ("Unable to recall what was said about the Metro contract in the May 29, 2008 meeting, and unable to explain the meaning or context of his subsequent emails relating to that meeting, *Councilmember Graham leaves the Board with no alternative.*") (emphasis added). This, of course, is far from fair. If the matter had proceeded to an evidentiary hearing, Councilmember Graham would have been able to put on his own evidence regarding what occurred during the May 29, 2008 hearing, as well as cross-examine the evidence that BEGA relied upon to make this finding.

[4] Indeed, the Cadwalader Report contains no mention of LaKritz Adler's campaign contributions to Councilmember Graham. Because Mr. Graham was asked to respond only to the factual findings in the Cadwalader Report, and his counsel was denied access to the underlying materials, Mr. Graham never had the opportunity to address the notion that Mr. Graham was motivated to include LaKritz Adler in the Florida Avenue Project because of campaign contributions, and was not on notice that BEGA was considering such a theory. BEGA's finding on this issue is utterly meritless, of course, but Mr. Graham was denied any opportunity to explain why that is so.

BEGA went on to make additional factual findings adverse to Mr. Graham by "substantial evidence," including: (1) resolving a dispute over the underlying purpose of the May 2008 meeting between Mr. Graham and Mr. Williams, *see id.* at 7, ("The weight of the evidence supports a finding that the purpose of the meeting, as originally scheduled, was to discuss the lottery contract;" (2) resolving a "dispute as to who requested that Mr. and Mrs. Williams attend the May 2008 meeting," finding that "Councilmember Graham made the request," *id.* at 8; (3) refuting Mr. Graham's explanation of a key email, *id.* at 12 ("We find [Councilmember Graham's] explanation unconvincing."); (4) assigning a personal motive to Mr. Graham's conduct with regard to Mr. Williams, *id.* at 17 ("There is substantial evidence that Councilmember Graham bore great personal animosity toward Mr. Williams"); and (5) concluding that Mr. Graham was motivated by animus in his vote on both the lottery contract and the Florida Avenue Project, *id.* at 18 ("The weight of the evidence is that Councilmember Graham used that personal animus and his vote on the District lottery contract to pressure Banneker's withdrawal from the WMATA deal.").

Despite concluding that it must dismiss the preliminary investigation, and despite its failure to conduct the adversarial hearing *required* by statute, BEGA went even further, finding that Mr. Graham violated three provisions of the District's Code of Conduct. BEGA stated that it had "weighed the evidence" and concluded that Mr. Graham had engaged in those violations. Mem. Op. at 16 ("The weight of the evidence before the Board demonstrates that [Mr. Graham] acted contrary to these obligations."); *id.* at 18 ("[W]e find that the conduct of Councilmember Graham displayed a complete lack of partiality."); *id.* at 20 ("[W]e find there is substantial evidence that Councilmember Graham's conduct violated [6B D.C. Mun. Regs 1803.1(a)(6)]."

4. Public and Media Reaction to BEGA's Memorandum Opinion

On the day after the BEGA Memorandum Opinion issued, the Washington Post editorial board ran an editorial calling for Mr. Graham's resignation from the D.C. Council. *See* Editorial, *Jim Graham Should Resign from D.C. Council*, Wash. Post (Feb. 7, 2013). The Post and other media outlets have also urged the D.C. Council, in particular its Chairman Phil Mendelson, to take action against Mr. Graham based on the BEGA Memorandum Opinion. Editorial, *Phil Mendelson Is Awfully Quite about Jim Graham's Troubles*, Wash. Post (Feb. 11, 2013); Jonetta Rose Barras, *Crime and No Punishment in D.C.*, Wash. Examiner (Feb. 11, 2013); Mike DeBonis, *All Eyes on Mendo*, WashingtonPost.com (Feb. 12, 2013); Colbert I. King, *D.C. Council Should Censure Jim Graham*, Wash. Post (Feb. 11, 2013).

ARGUMENT

1. BEGA's Memorandum Opinion Was Unlawful and Must Be Withdrawn.

BEGA acted unlawfully by making so-called "factual findings" and legal conclusions that have damaged Mr. Graham greatly. BEGA violated its authorizing statute, as well as its own rules that provide for extensive process before the Board may make findings by "substantial evidence," the very standard on which the Board is permitted to conclude, *after an adversarial hearing,* that a respondent violated the DC Code of Conduct.

a. By Issuing its Memorandum Opinion, BEGA Violated the D.C. Administrative Procedure Act.

i. *Mr. Graham has standing to challenge BEGA's actions.*

To establish standing to challenge an agency order, "the petitioner must allege (1) that the challenged action has caused [it] injury in fact, (2) that the interest sought to be protected . . . is arguably within the zone of interests protected under the statute or constitutional guarantee in question . . . and (3) that no clear legislative intent to withhold judicial review is apparent." *Miller v. District of Columbia Bd. of Zoning Adjustment,* 948 A.2d 571, 574 (D.C. 2008)

(internal quotation and footnote omitted). In addition, "[t]o establish standing, a litigant must show 'a substantial probability that the requested relief would alleviate [its] asserted injury." *Id.* at 575 (quoting *In re Z.C.*, 813 A.2d 199, 202 (D.C. 2002)). BEGA's actions here caused serious harm to Mr. Graham, granting him standing despite BEGA's dismissal of the preliminary investigation. BEGA's Memorandum Opinion caused severe reputational injury to Mr. Graham – a grave injury for any individual, and a particularly acute injury for an elected public official. *See, e.g., Meese v. Keene*, 481 U.S. 465, 473-75 (1987) (finding standing where government action "would substantially harm [the plaintiff's] chances for reelection and would adversely affect his reputation in the community.") BEGA's unlawful Memorandum Opinion led the Washington Post to demand that Mr. Graham resign a seat he has held on the D.C. Council for fifteen years. Moreover, the Council will imminently consider resolutions to sanction Mr. Graham in some fashion on the basis of BEGA's Memorandum Opinion. *See* Graham Aff., Exh. 2.

There can be no question that Mr. Graham has standing to seek a remedy for BEGA's violation of the law. Moreover, while the damage to Mr. Graham's reputation cannot be completely repaired by the relief requested here, if the Court were to declare BEGA's conduct unlawful and order the Memorandum Opinion stricken, BEGA's actions would no longer serve as a valid predicate for either the Council to sanction Mr. Graham, or for members of the public to assess his performance as a public official. While this may not be a perfect remedy, it is better than permitting BEGA's unlawful act to continue to propel a chain reaction of adverse consequences to Mr. Graham.

ii. *BEGA Acted Outside its Statutory Authority by Issuing its Memorandum Opinion without Conducting an Adversarial Hearing.*

An agency that acts in contravention of its statutory authority violates the District of Columbia's Administrative Procedure Act by failing "to observe procedure required by law." D.C. Code § 2-510(a)(3)(D). By operation of the statute that created it, BEGA may make "findings of fact" and draw conclusions that a violation of the Code of Conduct has been established by "substantial evidence" only after a formal investigation and adversarial hearing. D.C. Code § 1-1162.14. At the preliminary investigation stage, the Board's only proper inquiry is whether there is "reason to believe that a violation has occurred." *Id.* § 1-1162.12. As laid out above, the Act establishing BEGA compels it to follow the same process afforded to subjects of other contested agency action in the District, *see id.* § 1-1162.14. In 2012, BEGA adopted rules governing the conduct of its investigations, including the provision of procedural safeguards consistent with due process and the D.C. Administrative Procedure Act. As discussed below, however, BEGA simply ignored its own rules in this matter.

By issuing its Memorandum Opinion, BEGA acted as though it had both completed the preliminary investigation and conducted the *formal* investigation, despite the fact that it concluded it must dismiss the former on constitutional grounds, and it never even initiated the latter. Mr. Graham was therefore effectively convicted without a trial. The *only* instance in which BEGA may forego a hearing is if it dismisses its investigation based on a finding that there is no merit to the complaint. *See* D.C. Code § 1-1162.14(a) (1) ("A hearing need not be conducted if a matter is dismissed pursuant to § 1-1162.16(a)"); *see id.* at § 1-1162.16(a) ("The Ethics Board may dismiss, at any stage of the proceedings, any claim, complaint, request for investigation, investigation, or portion of an investigation that the Ethics Board finds to be without merit.") The Board's dismissal here was based on its inability to sanction Mr. Graham consistent with the *Ex Post Facto* clause of the United States Constitution. It was not a dismissal

on the merits as contemplated by § 1-1162.16(a). Indeed, the Board not only found there *was* reason to believe that Mr. Graham committed ethics violations, it then did an end run around the statute by dismissing the investigation, but only after conducting ex parte fact finding, failing to provide any discovery, and ignoring its statutory mandate that it "shall" conduct a full adversarial hearing if it proceeds to the formal investigation stage on the basis that there is "reason to believe" a violation occurred. Having concluded it could not sanction Mr. Graham consistent with the Constitution, BEGA nonetheless extracted its pound of flesh by making countless factual "findings" and concluding that Mr. Graham violated the law without affording him any process whatsoever.

While the Board's dismissal of the preliminary investigation was correct, its egregious action in issuing a full-blown set of findings and legal conclusions short-circuited the process that would otherwise have permitted Mr. Graham and his counsel to view the evidence against him, confront it, present contrary evidence and argument, and propose findings of fact after a full adversary hearing. There is no question that the Act requires such process before factual findings and legal conclusions can be made, for the obvious reason that respondents' reputations, careers, and livelihoods are at stake. BEGA's Memorandum Opinion is contrary to law and must be withdrawn.

iii. *BEGA Violated the DC Administrative Procedure Act by Failing to Follow Its Own Rules.*

"It is a basic tenet of administrative law that an administrative agency is bound to follow its own rules and regulations." *Macauley v. District of Columbia Taxicab Comm'n*, 623 A.2d 1207, 1209 (D.C. 1993) (citations omitted); *see also Ballard v. Comm'r of Internal Revenue*, 544 U.S. 40, 59 (2005) (federal agencies must follow their own rules). An agency's failure to do so renders its actions arbitrary and capricious, an abuse of discretion, and not in accordance with

law. D.C. Code § 2-510(a)(3)(A); *accord Ingram Barge Co. v. United States*, 884 F.2d 1400, 1405 (D.C. Cir. 1989) ("Thus, even if the [agency] had made and then breached a promise to depart form its own regulation, its departure – not its return to the established course – would be arbitrary and capricious."); *Fuller v. Winter*, 538 F. Supp. 2d 179, 186 (D.D.C. 2008) ("It is a fundamental principle of administrative law that an agency is bound to adhere to its own regulations. Indeed, failure to do so can lead to arbitrary and capricious decision-making in violation of the APA."). An aggrieved party is therefore entitled to judicial review of the agency action. *See* D.C. Code § 2-510(a)(3); *see also Webster v. Doe*, 486 U.S. 592, 602 n.7 (1988).

Here, BEGA acted in contravention of several of its rules. BEGA's rules, which are now codified as regulations in the D.C. Municipal Regulations, follow the two-step process mandated by its authorizing statute: first, a preliminary investigation and, second, a formal investigation. BEGA is required to conduct its investigations "[f]airly and professionally; . . . [s]o as to protect the rights and reputations of public employees and officials; and . . . [i]n accordance with due process." D.C. Mun. Regs., tit. 3, § 5300.2. As this filing should make evident, this investigation needlessly damaged Mr. Graham's rights and reputation and was not conducted in accordance with due process.

In the normal course, BEGA first engages in a preliminary investigation, in which the Director presents evidence of a potential violation to the Board. D.C. Mun. Regs., tit. 3, §§ 5301.1, 5301.2. If BEGA finds that there is "reason to believe a violation has occurred," it "may authorize a formal investigation and the issuance of subpoenas." *Id.* § 5301.3. At the formal investigation stage, BEGA *must* (1) conduct an open and adversarial hearing at which the Director of Government Ethics shall present evidence of the violation." *Id.* § 5401.1. The respondent is entitled to discovery in advance of the hearing. *Id.* § 5511.3. At the hearing, all

parties may introduce evidence and witnesses on their behalf, cross-examine the other parties' witnesses, and offer arguments in support of their positions. *Id.* §§ 5517.1, 5517.2. At the close of the adversarial hearing, the Board may ask for proposed findings of fact and conclusions of law. *Id.* § 5520.1. Finally, "[w]ithin a reasonable time after the conclusion of the hearing, the Board shall render its decision setting forth findings of fact and conclusions of law and giving the reasons for the decision." *Id.* § 5521.1. "The conclusions or opinion in the decision shall be governed by and based upon all the evidence adduced at the hearing." *Id.* § 5521.3. The decision "shall be supported by substantial evidence on the record." *Id.* § 5521.4.

In issuing its Memorandum Opinion purporting to represent its "factual findings," and its conclusion that Mr. Graham committed violations of the DC Code of Conduct based on "substantial evidence," BEGA adhered to *none* of its rules governing its investigative process. Mr. Graham was denied discovery, denied an opportunity to confront the evidence that BEGA considered in making its unlawful "findings," denied a right to cross-examine the witnesses that participated in the Cadwalader internal investigation, which was of course ordered by WMATA for its own purposes. There is no ambiguity in either the statute or in BEGA's Rules that an adversarial hearing "shall" be held where BEGA finds "reason to believe" a violation occurred. The Board's failure to adhere to its rules that would afford Mr. Graham required due process precluded it from making factual findings adverse to Mr. Graham, much less conclusions that the Board found by "substantial evidence" that Mr. Graham violated the DC Code of Ethics. BEGA's action in issuing its Memorandum Opinion replete with factual findings and ultimate legal conclusions was arbitrary and capricious and must be overturned.

b. <u>BEGA's Memorandum Opinion Violated Mr. Graham's Procedural Due Process Rights.</u>

"The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1913). It is beyond cavil that procedural due process consistent with the Fourteenth Amendment is guaranteed in the context of administrative proceedings in which the government adjudicates important property and liberty interests. *See, e.g., Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (in context of parole proceedings, minimal requirements of due process held to include disclosure of evidence, opportunity to be heard and present witnesses, right to confrontation and cross-examination, a neutral and detached hearing body, a written statement by factfinders giving reasons for decision); *Greene v. McElroy*, 360 U.S. 474, 496-97 (1959) (describing minimal due process requirements in welfare administration proceedings).

There can be no question that Mr. Graham was denied even the most minimal due process protections in this matter. As described above, his counsel's request for discovery was denied. His counsel's brief appearance before the Board, after repeated requests to do so, was limited to addressing the issues raised in Mr. Graham's response to the Cadwalader Report. It was not the adversarial hearing to which Mr. Graham was entitled under law and under BEGA's rules. Indeed, his counsel's response was informed only by the information contained in the four corners of the Cadwalader Report. Neither Mr. Graham nor his counsel has ever seen the written record on which BEGA made its "factual findings," nor did he have any opportunity to cross-examine the witnesses whose depositions were taken in a WMATA internal investigation, not in an adversarial proceeding in which Mr. Graham's counsel participated. BEGA's "findings" and conclusions inflicted serious reputational and professional harm on Mr. Graham, in violation of the most sacred principles underlying the administration of justice:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the

> reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealous. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny.

Greene, 360 U.S. at 496-97.

BEGA's issuance of the Memorandum Opinion without providing due process to Mr. Graham is simply indefensible. It is ironic, indeed, that BEGA recognized its inability to sanction Mr. Graham because such action would be inconsistent with the Constitution, while it proceeded to issue damning findings and – indeed – declare that he violated the law, without even a passing recognition of his constitutional right to defend himself. BEGA acted in violation of Mr. Graham's due process rights, and its Memorandum Opinion must be stricken.

CONCLUSION

For the foregoing reasons, Mr. Graham respectfully requests that this Court find that BEGA acted unlawfully in issuing its Memorandum Opinion and issue an Order compelling BEGA to withdraw its Memorandum Opinion accordingly.

Respectfully submitted,

Dated: February 21, 2013

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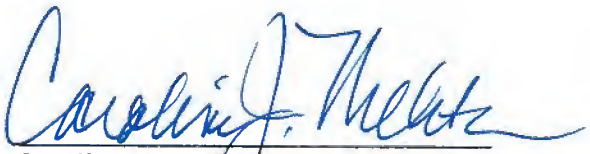
CERTIFICATE OF SERVICE

I, Caroline Judge Mehta, hereby certify that on this 21st day of February 2013, a true and accurate copy of the Petition for Review from Action of the Board of Ethics and Government Accountability was served electronically and by hand, as noted below upon the following:

Mr. Darrin P. Sobin (Electronically and By Hand)
Director of Government Ethics
Board of Ethics and Government Accountability
Office of Government Ethics
441 4th Street, N.W., Suite 830 South
Washington, D.C. 20001
EMAIL: darrin.sobin@dc.gov

*** Mr. Sobin was served electronically with the Petition for Review on February 20, 2013.

Office of the Attorney General (By Hand)
District of Columbia
441 4th Street, NW
Washington, DC 20001



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